In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 37.

TOM TUNSTALL,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775 and W. M. MUNDEN.

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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 55) is reported in 140 F. 2d 35. The opinion of the United States District Court for the Eastern District of Virginia (R. 36) is not reported.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit was entered on January 10, 1944 (R. 59). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 347).

STATEMENT OF THE CASE.

Petitioner, a negro fireman employed by the Norfolk Southern Railway Company, brought this action in the District Court of the United States for the Eastern District of Virginia on behalf of himself and other negro firemen employed by that railroad against the Railway Company, the Brotherhood of Locomotive Firemen and Enginemen, two subordinate lodges of that railroad labor union, and an officer of one of the local lodges.

The gravamen of the complaint is that the petitioner as a fireman employed by the respondent railway company had acquired certain contractual rights in the nature of seniority rights; that the Brotherhood as the bargaining agent of the whole craft of firemen had negotiated a certain agreement with the railway which modified the seniority rights in a manner that discriminated against petitioner; and that thereby petitioner suffered detriment with respect to his seniority rights, sometimes referred to as assignments. The complaint asks for a declaratory judgment that the union, as bargaining representative, is bound to represent fairly and impartially all members of the craft; an injunction restraining the defendants from enforcing or operating under the agreement complained of insofar as it discriminates against negro firemen, and restraining the union from acting as the bargaining representative of the negro firemen so long as it refuses to represent them fairly and impartially; an award against the union for damages; and an order restoring petitioner to the assignment to which he claims he is entitled and of which he claims he was deprived.

The complaint contains no allegation of diversity of citizenship. It asserts jurisdiction under 48 Stat. 1185; U. S. C. Title 45, Chapter 8; U. S. C. Title 28, Section 41 (8); U. S. C. Title 28, Section 400; and the Federal Rules of Civil Procedure. Federal jurisdiction depends on

whether the controversy is one arising under the laws of the United States.

The return of the Marshal showed that no service whatever had been had on the Brotherhood and that no legal or proper service had been had on Ocean Lodge No. 76. These two defendants by timely motion, appearing specially, severally moved to dismiss the action as against them respectively, on the ground that no proper service had been made on them.

All of the defendants severally filed their motions to dismiss the action upon the grounds, *inter alia*, that the same did not arise under the Constitution or laws of the United States, that no sufficient basis of federal jurisdiction is alleged or appears from the complaint, and that no diversity of citizenship is alleged or shown.

The District Court decided that no federal question was presented and no jurisdiction inhered in that court to hear and decide the case. Accordingly, on May 7, 1943, it granted motions to dismiss filed by respondents, and entered judgment for the defendants and against the plaintiff.

From this judgment plaintiff (petitioner herein) appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which, by its opinion rendered January 10, 1944 (140 F. 2d 35), affirmed the order of the District Court.

SUMMARY OF ARGUMENT.

I. Respondents, Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, were not served with process, are not before the Court, and there is no jurisdiction of the person as regards said two respondents.

II. The essential and primary object of petitioner's complaint is to protect his alleged assignment rights (generally referred to therein as "seniority rights") which rights arise and originate solely out of contract.

III. Petitioner seeks to support federal jurisdiction by references to the Railway Labor Act, all of which are wholly unnecessary to the statement of the cause of action and are merely anticipatory of a probable defense thereto.

IV. Assuming, arguendo, that any federal question is presented by the complaint, such federal question is unsubstantial and insufficient as a basis of federal jurisdiction.

V. The judicial relief demanded by the complaint is not relief as to which jurisdiction is vested by the Railway Labor Act in the federal courts. Therefore, there is no federal jurisdiction in this case.

ARGUMENT.

I. Respondents, Brotherhood of Locomotive Firemen and and Enginemen and Ocean Lodge No. 76, were not served with process, are not before the Court, and there is no jurisdiction of the person as regards said two respondents.

The return of the Marshal of service of the summons and complaint as to respondent Brotherhood of Locomotive Firemen and Enginemen is this: "Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this district." (R. 53.)

By timely motion under Rule 12 (b) of the Rules of Civil Procedure, the respondent Brotherhood of Locomotive Firemen and Enginemen, appearing specially, moved to dismiss the action on the ground that there had been no service of process on it; that it is a voluntary unincorporated association (cf. Complaint R. 2), and that no officer or trustee had been served with process; and that the court lacked jurisdiction of its person because there had been no service of process and this respondent was not before the court. (R. 25.)

Notwithstanding the return showing that no service on the respondent Brotherhood had ever been made, the

District Court held that it had been duly served and was properly before the Court; it overruled the motion to dismiss on the ground that no service of process had been had. (R. 50.) In the same judgment the District Court dismissed the complaint on the ground of lack of jurisdiction of the subject matter.

The action of the District Court in refusing to dismiss the complaint as to the respondent Brotherhood for lack of jurisdiction of its person was made the subject of complaint in the brief filed by that respondent with the Fourth Circuit. The point was not noticed in the opinion of the Circuit Court of Appeals for the Fourth Circuit.

It seems superfluous to argue that the Brotherhood, as to which the Marshal's return shows no service of process, is not before the Court unless service on its subordinate lodges be held to be service upon it.

Rule 17 (b) of the Rules of Civil Procedure provides that capacity to sue or be sued shall be determined by the law of the state in which the District Court is held.

Section 6058 of the Code of Virginia of 1936 reads as follows:

> "All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served on any officer or trustee of such association or order."

Rule 4 (d) (3) of the Rules of Civil Procedure provides that service shall be made upon an "unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *."

This record shows no service on any officer, trustee, managing or general agent or any other agent authorized by appointment to receive service of process. No agent is authorized by law to receive such service (Code of Virginia, § 6058, *supra*). Service upon an officer of a subordinate lodge is insufficient and constitutes no service at all against the association. *International Brotherhood of Boilermakers v. Wood*, 162 Va. 517.

It further affirmatively appears from the record that respondent Ocean Lodge No. 76 has never been served with process and is not before the Court. The return of the Marshal as to this respondent is as follows:

> "Not finding any representative of the within named Lodge (Ocean Lodge No. 76) I served a copy of the Summons together with a copy of the Complaint, by delivering same to Lucile Munden, she being the wife of W. M. Munden, and above the age of sixteen years and a member of his family at his regular place of abode at 1123 Hawthorne Avenue, South Norfolk, Va. for delivery to the within named W. M. Munden at his regular place of abode, a place within my District.
>
> "R. L. Ailworth, United States Marshal,
> by H. L. Trimyer, Deputy U. S. Marshal."
> (R. 54.)

By timely motion respondent Ocean Lodge No. 76 appeared specially and moved to dismiss the action so far as concerned it, and to quash the purported service of summons on the ground that no proper service had been made on said Ocean Lodge No. 76, and the Court lacked jurisdiction over the person of that defendant. (R. 32.) The District Court in its final judgment held that Ocean Lodge No. 76 had been duly served and was properly before the Court. (R. 50.) Complaint upon this ruling was made in the brief filed by this respondent with the Circuit Court of Appeals. The point was not noticed in its opinion.

The Marshal's return does not state whether W. M. Munden or Lucile Munden are in any way connected with officers or trustees or agents of said Ocean Lodge No. 76. Even if it be assumed that W. M. Munden is an officer of said Ocean Lodge No. 76, service upon his wife is no service upon the Lodge. Section 6041, Virginia Code of 1936, provides, so far as pertinent here, as follows:

> "A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family (not a temporary sojourner or guest) and above the age of sixteen years; or if neither he nor she, nor any such person be found there, by leaving such copy posted at the front door of said place of abode."

Section 6062 of the Code of Virginia of 1936 provides, so far as pertinent here, as follows:

> "Any summons or *scire facias* may be served in the same manner and by the same person as is prescribed for the service of a notice under Section Six Thousand and Forty-one, except that when such process is against a corporation the mode of service shall be as prescribed by the two following Sections."

The two "following Sections" just above referred to are Sections 6063 providing for service of process on domestic corporations, and 6064 providing for service on foreign corporations. Neither provides for service on unincorporated associations which is covered only by Section 6058 hereinabove quoted. An unincorporated association in Virginia can be sued and served only by virtue of that section. *International Brotherhood of Boilermakers v. Wood, supra.* In Virginia, service against a domestic corporation can not be made by serving the wife of an officer, director or agent of a corporation. *Waterfront Coal Co.*

v. Smithfield Transportation Co., 114 Va. 482; *Burks Pleading & Practice* (3d Ed.) 74.

It is clear that Ocean Lodge No. 76 has never been served with process; and, by reason of its special appearance and its motion to quash the service and dismiss the action, it is not before the Court.

The basis of petitioner's complaint arises out of a contract which petitioner claims invades his rights. Only one of the contracting parties—the railroad—is before the Court.

This point can properly be brought to the attention of the Court without the assignment of cross error or the entry of a cross appeal. The general principle is stated in *Moore's Federal Practice*, §3, 3394; 3577: "But the appellee may, even though he has not entered a cross appeal, defend a judgment on any ground consistent with the record, even if rejected below."

Supporting this principle are the following cases: *Langues v. Green*, 282 U. S. 531, 535; *Commissioner v. Havemeyer*, 296 U. S. 506, 509; *United States v. Curtiss-Wright Co.*, 299 U. S. 304, 330; *Morley Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191.

Since this point is jurisdictional and goes to the right of any court, trial or appellate, to take cognizance of this action as regards respondents Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, it may be raised at any time or in any manner, and, indeed, could be considered by the court *ex mero motu*.

II. The essential and primary object of petitioner's complaint is to protect his alleged assignment rights (generally referred to therein as "seniority rights"), which rights arise and originate solely out of contract.

The first requirement in resolving the question for decision is the proper construction of the complaint. The rule to be followed for this purpose was stated by Mr.

Chief Justice Waite in the case of *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199, and later quoted with approval by Mr. Justice Fuller in the case of *Chicago, Rock Island and Pac. Ry. Co. v. Martin*, 178 U. S. 245 (1900), as follows:

> "*A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States.* The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. * * * Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, *it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States.*" (Italics ours.)

We therefore begin by asking, what right is it that the petitioner is apparently seeking to protect by this action, as disclosed by a study of the complaint, when consideration is given to only those statements of fact necessary to stating petitioner's cause of action "in legal and logical form, such as is required in good pleading."

A reading of the allegations of the complaint and the prayer for relief reveals one dominant consideration with which petitioner is concerned in this action, to-wit, his (seniority) right to be assigned to the Norfolk-Marsden run. He sues as an employee of the Norfolk Southern Railway. The significance of his alleged rights is described, and they are characterized as "valuable property rights." The fact is stressed that they form an integral part of petitioner's contract of employment with the defendant railroad. The emphasis placed by petitioner upon his alleged right to a particular assignment by virtue of a

contract of employment is readily understandable, for his case would obviously fail without allegation and proof of the existence of personal rights arising from contract with the employer.

Petitioner explains that for collective bargaining purposes the Brotherhood is the representative of all the firemen employed by the defendant railroad. Reiterated throughout the complaint is the charge that the Brotherhood wrongfully induced and forced the defendant railway company to remove petitioner and other negro firemen from their assignments and to replace them with Brotherhood members.

The Brotherhood is alleged to have entered into an agreement with the railway on February 18, 1941, later supplemented on May 23, 1941, the direct result of which was to deprive petitioner on October 10, 1941, of the right to act as fireman on the Norfolk-Marsden run. Petitioner's assignment (seniority) rights, he asserts, entitled him to that run, but it was given instead to a white locomotive fireman, a member of the Brotherhood.

Among the items of relief prayed for, petitioner asks that the defendants be permanently enjoined from making effective the agreement of February 18, 1941, and the supplement of May 23, 1941, in so far as they give to a white fireman jobs in violation of petitioner's alleged right to assignment on the Norfolk-Marsden run, and damages of $25,000.00 from the Brotherhood for "the destruction of his rights as a locomotive fireman." The seemingly irresistible conclusion is that *the rights about which the action is dominantly concerned are contract rights.* They have allegedly been violated by the railroad and the Brotherhood, by action described as fraudulent.

It is fundamental that seniority rights, or what petitioner has chosen to call assignments, arise solely from agreement or contract negotiated with the employer (*Hartley v. Brotherhood of Railway and Steamship Clerks*, 283

Mich. 201, 277 N. W. 885; *Order of Railway Conductors v. Shaw*, 189 Oklahoma 665, 119 Pac. (2d) 549; *Ryan v. The New York Central R. Co.*, 267 Mich. 202, 255 N. W. 365; *Norfolk & Western R. Co. v. Harris*, 260 Ky. 132, 84 S. W. (2d) 69).

Protection of contract rights flows from the common law and it is such protection, as a critical examination of the complaint discloses, that is sought in this action. Petitioner would be entitled to relief in protection of his alleged assignment or seniority rights if he but establishes the existence of the claimed rights and their violation by the refusal of the railroad to permit them to operate the runs to which his rights entitle him, provided the defendants fail to establish in their own defense a superior right authorizing or permitting them to interfere with petitioner's alleged rights. Stated in a different way, petitioner would be entitled to relief upon establishing contract rights and subsequent failure of the railroad to accord him a job consistent with them, provided no justification for its action was alleged and proved by the railroad. Such a suit partakes of the character of breach of contract and would clearly be one at common law cognizable, if at all, in the state courts.

Petitioner describes himself as a fireman employed by the Norfolk Southern Railway Company. In June 1941, a fireman's job on a passenger run between Norfolk, Virginia, and Marsden, North Carolina, became vacant, and petitioner, "in accordance with his individual contract of hiring" (Complaint, R. 10) was assigned to the run. Petitioner held this job until on or about October 10th, 1941, when he was removed from it by the railway company at the insistence of the Brotherhood, in contravention of the "valuable property rights that have accrued to him while in the service of the defendant Railway Company" (Complaint, R. 11). Since that time petitioner has been forced, so he alleges, to accept less desirable work in yard assign-

ments (Complaint, R. 11). And unless this Court requires the defendants to restore petitioner to the said passenger run and cease interfering "with his occupation as a locomotive fireman employed by the defendant Railway Company" (para. 3 of prayer, R. 13), he will "suffer irreparable damage" (Complaint, R. 11).

These are the primary facts giving rise to petitioner's grievance, as revealed by the complaint. A simplified statement of this grievance might be made thus:

That the plaintiff acquired "valuable property rights" during the course of his employment as a fireman by the Norfolk Southern Railway; that these rights entitled him in 1941 to a fireman's job on a certain passenger run, and he was accordingly assigned to this run. Some time later he was improperly removed from this assignment by the railroad through the influence of the Brotherhood. Irreparable damages followed.

Petitioner's alleged grievance is typical of many that have been presented to the courts in recent years, e.g. *Teague v. Brotherhood of Locomotive Firemen and Enginemen* (C. C. A. 6th), 127 F. 2d 53; *Steele v. L. & N. R. R. Co.*, 245 Ala. 113, 16 So. 2d 416; *Burke v. Union Pac. R. R. Co.* (C. C. A. 10th) 129 F. 2d 844; and *Barnhart v. Western Maryland Ry. Co.* (C. C. A. 4th), 128 F. 2d 709.

A substantial portion of the complaint has been devoted to explaining the circumstances under which, and reasons why, the Brotherhood induced the defendant railroad to remove petitioner on October 10th, 1941, from the passenger assignment. In making this explanation, petitioner undertakes to demonstrate that a federal question is involved in his cause of action.

Petitioner's explanation of the Brotherhood's action is that the Brotherhood has been the statutory representative, for collective bargaining purposes, of the firemen's craft on the Norfolk Southern Railway since the enactment of the Railway Labor Act on June 21, 1934. On Feb-

ruary 18, 1941, the Brotherhood negotiated an agreement with the defendant railroad for the purpose of regulating the future assignment of firemen to fill vacancies caused by the death, dismissal, resignation or disqualification of firemen. This agreement provided that such vacancies would be filled by only promotable firemen (white firemen), until such time as fifty per cent of the firemen's jobs were held by promotable firemen. The fifty per cent ratio between promotable and non-promotable firemen called for by the agreement was to be established notwithstanding the fact that it would in some instances require the assignment of promotable firemen to jobs when non-promotable firemen with greater seniority would be available for the assignment.

Petitioner alleges that the Brotherhood, in inducing the defendant railroad to remove him from the passenger run on October 10, 1941, was presuming to act in accordance with the terms of the February 18, 1941, agreement with the carrier.

Petitioner does not rest with this unnecessary explanation as to *why* the Brotherhood allegedly induced the defendant railroad to remove him from the passenger run on October 10, 1941. He takes the further step of charging that the agreement of February 18, 1941, is invalid, and bases its alleged invalidity upon the failure of the Brotherhood to observe toward the plaintiff and others the duties and limitations allegedly imposed upon it in the performance of its functions as a statutory representative by the Railway Labor Act.

III. Petitioner seeks to support federal jurisdiction by references to the Railway Labor Act, all of which are wholly unnecessary to the statement of the cause of action and are merely anticipatory of a probable defense thereto.

It is in the manner noted above that petitioner attempts to demonstrate, in the course of stating a cause of action based upon the violation of his contract of employment with the Norfolk Southern Railway, the possible existence of a federal question lurking amidst the issues comprising his case. He attempts to show the existence of a federal question by the simple process of anticipating the issues that *may* be raised by one of the several defenses which *may* be asserted by the Brotherhood to this action.

Having pleaded the possession of contract rights which entitled him to a particular job or assignment, and the allegedly unwarranted interference by the Brotherhood with the enjoyment of those contract rights, so as to deprive him of the said job or assignment, with resultant damages, petitioner had stated a prima facie cause of action. It was then in order for the Brotherhood to plead its defense, or defenses, in justification of its action of having petitioner removed from his passenger assignment.

The defense could take any one of several forms. For example, the existence of the contract rights to the particular job or assignment claimed by petitioner might be challenged. Another defense might be that the seniority rights claimed by petitioner were the fruits of an earlier bargaining agreement made between the Brotherhood and the respondent railway, and that these rights were subject, in accordance with the express terms of the earlier agreement, to being modified by subsequent agreements between the same parties. Another defense could be a denial that the Brotherhood ever purported to be, or ever was in fact, the representative of the petitioner or other negro firemen for collective bargaining purposes. A still

further defense might be that the Railway Labor Act authorizes, or permits, the Brotherhood, acting as the representative of firemen, to negotiate with the respondent railway any agreement, including the agreement of February 18, 1941, which both deem to be in the interest and welfare of the employees and the railway. Other possible defenses to this action not involving a federal question can be suggested. We pause to assert that, if the Brotherhood should ever be required to answer the complaint, it will justify any agreement that it has made with the respondent railway on the ground that it was made in the interest of good railroad management.

Anent this latter point, an examination of the agreement of February 18, 1941 (R. 16) reveals a well integrated plan dealing with the employment of locomotive firemen and their training and promotion to the position of engineer, the primary objective of the plan being the creation and maintenance of an adequate corps of competent firemen and engineers. This is accomplished through the induction into service of a sufficient number of employees who are considered by the railroad as eligible to promotion to the position of engineer and who are, according to the plan sought to be established by the agreement, to be afforded an opportunity to become experienced in all aspects of engine operation and service as a necessary prelude to promotion and assignment to the exacting job of running a locomotive. Manifestly, justification for such an agreement can be found in an existing or impending shortage of firemen qualified to be engineers and in the prospective contribution to efficient operation.

We will analyze the more important provisions in the agreement to discover whether it conforms to the above pattern. Sections 1 and 2 pertain in large part to the hiring of firemen. In order that at least half of the firemen in each class of service shall be firemen in training for and in position to qualify themselves for the job of engineer,

it is provided that the proportion of non-promotable firemen shall not exceed fifty per cent in each class of service, and that until such percentage is reached on any seniority district only promotable men will be hired. Stated otherwise, in instances where the corps of firemen who are potentially engineers is less than fifty per cent of the total in employment, it is provided that no non-promotable firemen will be employed until the desired percentage is attained.

It is a matter of common knowledge that service as a locomotive fireman constitutes an apprenticeship for the position of engineer, qualification for which is achieved principally through practical familiarization with road conditions and the many types of engines or locomotives to which the fireman will be assigned in the course of his future duties as an engineer. To afford a sufficient opportunity for promotable firemen to acquaint themselves with road conditions and the variety of locomotives in use, provision is made in Section 2 (b) that, until the specified percentage is reached, new runs and vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. Under circumstances where non-promotable firemen greatly preponderate, it is obvious that, because they do not leave firing jobs for work as engineers, they may and do occupy the senior firing positions permanently and hence preclude promotable firemen from gaining the experience of operating such runs. Firemen who have never served on fast passenger or freight trains, for example, find it difficult to successfully perform the duties of engineer on such trains.

Section 6 requires all persons newly hired as firemen to demonstrate their qualification to hold firing jobs by passing two examinations prepared by the management within a period of three years. The penalty for failure to pass is removal from service. Promotable firemen passing such examinations are then required to submit to examinations for promotion to the position of engineer after

not more than four years of service as firemen, and upon qualification may be assigned as engineers when the need for additional engineers develops. Dismissal from service is the penalty attached to declination to take or failure to pass the promotion examinations. The ends sought to be achieved through application of this section are apparent without extensive explanation. The examinations are designed to develop proficiency in the respective services while the provisions relating to severance from service in instances of inability to qualify insure the elimination of demonstrably incompetent workmen. It may be noted that only promotable firemen must subject themselves to the promotion examinations and the hazard of loss of employment incident thereto.

These statements of any one of the many forms which the defense might take disclose the existence of several defenses upon which reliance may be placed without involvement of any federal law or question in the defense. With these observations, we return to a discussion of the nature of petitioner's basic claim.

It is clearly apparent that the primary right which petitioner seeks by this action to protect is the right to hold the passenger assignment from which he was allegedly removed at the instance of the Brotherhood on October 10, 1941. This right does not flow from the Railway Labor Act. It is derived solely from a contract. And whether or not the Brotherhood's alleged interference with petitioner's contract rights was justified and lawful under the principles of the common law, or was authorized by the Railway Labor Act, are matters that belong to the defense and have no proper place, under the rules and principles of good pleading, in the complaint. Petitioner's cause of action, properly pleaded, will not disclose the existence of a federal question. The inclusion of unnecessary and argumentative matter in the complaint is simply an unwarranted anticipation of one defense, among several pos-

sible defenses, which the Brotherhood may rely on. Federal jurisdiction cannot be predicated on a federal question injected in this fashion into the complaint.

The jurisdictional question arose in *L. & N. R. R. Co. v. Mottley*, 211 U. S. 149, in a manner so clearly identical with the origin of the question in this case, that we believe the decision in that case should be controlling of the decision here. The bill of complaint in the *Mottley* case alleged that the plaintiffs, while passengers on the L. & N. Railroad, were injured. In settlement of the plaintiffs' claim for damages, the railroad agreed to provide the plaintiffs with annual transportation passes during their lives. This contract the railroad performed for many years, until 1907, when it declined to furnish renewal passes, and this action was brought to secure specific performance of the contract.

In both the *Mottley* case and the instant case, a contract was the source of the rights relied upon, and in each instance the plaintiff's contract rights were allegedly violated. The similarity of the cases goes further. In the *Mottley* case the complaint alleged that the railroad purported to justify its refusal to respect the plaintiffs' contract rights on the authority of a recently enacted federal statute regulating commerce, which statute forbade railroads giving free passes and transportation. The plaintiffs further alleged that such justification was unfounded because the federal statute did not apply to the giving of passes pursuant to a contract such as existed between the plaintiffs and defendant railroad, and in all events if the law was held to be applicable to the plaintiffs' contract, it would be invalid as being in conflict with the Fifth Amendment of the Constitution, because it would be depriving the plaintiffs of property without due process of law.

In a similar way the complaint in the instant case alleges, in substance, that the violation of petitioner's assignment (seniority) rights was accomplished, and pur-

ports to be justified by the Brotherhood acting under its authority as a representative of all the firemen on the defendant railroad for collective bargaining purposes in accordance with the provisions of the Railway Labor Act. But, the complaint further alleges, the Railway Labor Act does not authorize or permit the Brotherhood to disregard petitioner's seniority rights as it has. In all events, petitioner contends, if the Railway Labor Act does sanction such action by the Brotherhood as a representative, it is invalid as being in violation of the Fifth Amendment because it deprives him of property without due process of law.

The demurrer to the bill in the *Mottley* case was overruled, and the relief prayed for by the plaintiffs was allowed by the trial court. On appeal, this court observed the fact that the demurrer to the bill raised two questions of law, the first being whether the federal law prohibited the performance of the contract between the railroad and the plaintiffs, and, secondly, if the statute did have this effect, whether it violated the Fifth Amendment. The Court then proceeded with its decision as follows:

> "We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. (Citations.)
>
> "There was no diversity of citizenship and it is not and can not be suggested that there was any ground of jurisdiction, except that the case was 'a suit • • • arising under the Constitution and laws of the United States.' Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is the settled interpretation of these words as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own

cause of action shows that it is based upon those laws or that Constitution. It is not enough that plaintiff alleges some anticipated defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution."

This court ordered the judgment reversed and the case remanded to the lower court with instructions to dismiss it for lack of jurisdiction. The rule of the *Mottley* case did not originate with that case. It had long previously been established, and has since been applied many times. See, for example, *Gully v. First National Bank*, 299 U. S. 111 (1936); *Campbell v. Chase National Bank*, 71 F. 2d 669 (C. C. A. 2nd, 1934), 94 A. L. R. 768, and Note.

The references in the complaint to the Brotherhood's status as a representative under the Railway Labor Act, and the duties that are in consequence imposed on the Brotherhood in its relations with the plaintiff are, of course, only conclusions of the pleader. Their presence in the complaint may be questioned on this ground. But we have undertaken to demonstrate that they are surplusage to a statement of the plaintiff's cause of action "in legal and logical form,"—that their only purpose is to anticipate a possible defence to the action. The statement that the Brotherhood is under a statutory obligation to represent the petitioner fairly and impartially and in good faith; that it must give him and all firemen reasonable notice, opportunity to be heard and a chance to vote on any action adverse to their interests; make prompt and full disclosure of all actions taken affecting petitioner's interests; and that the Brotherhood neglected its duties in these respects when it concluded with the railroad the agreement of February 18, 1941, and the supplement thereto of May 23, 1941, must be considered as raising issues no more than inci-

dental to the primary issue in this case, to-wit, the question whether petitioner's alleged assignment, seniority or contract rights have been unlawfully interfered with by the respondents. They must be considered as being only incidental to the primary issue, because petitioner's cause of action would be established in a *prima facie* sense if he but proved that his claimed rights were embodied in a subsisting contract between him and the railroad and that they were denied him by the railroad as a consequence of an agreement between the railroad and the Brotherhood. These incidental issues will arise and become relevant to the disposition of the case only in the event the Brotherhood admits the facts pleaded in the complaint and justifies its action as being within its lawful authority as a representative under the Railway Labor Act.

Perhaps the most that can be said concerning these incidental issues is that they constitute federal questions lurking somewhere in the background of this action. They may or may not become issues of importance, depending upon the future development of pleadings and events at the time of a trial. The necessity of distinguishing between the primary issue that serves to characterize an action as one arising under a federal law, and incidental issues that may develop during an action but which cannot be the basis of federal jurisdiction, was explained and emphasized by Mr. Justice Cardozo in *Gully v. First Natl. Bank*, 299 U. S. 111 (1936), as follows:

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. (Citations) To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situation which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without

end. (Citations) Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by."

Our argument thus far has been addressed principally to the point that the references in the complaint to the Railway Labor Act serve only to anticipate a possible defense, and allegations of this character cannot avail as a basis of federal jurisdiction. The same argument is applicable with even greater clarity to petitioner's implied contention that the complaint states a cause of action arising under the Fifth Amendment.

Let us follow the innuendo by which the petitioner suggests that this action arises under the Fifth Amendment. The complaint alleges that the plaintiff has an individual contract of employment giving him certain property rights; that he has been deprived of these rights by an agreement and supplement entered into between the Brotherhood and the railroad, and acts done pursuant thereto. The complaint then explains that this alleged agreement and supplement were promoted by the Brotherhood in its capacity as a representative of petitioner under the Railway Labor Act, and that the Brotherhood was acting in fraud of the rights of petitioner and other negro firemen and in breach of its duty to them. From this petitioner argues that if the Railway Labor Act were construed so as to authorize or permit a representative to do as the Brother-

hood is charged by petitioner as having done, then and in that event the Railway Labor Act would be violative of the Fifth Amendment. We doubt that petitioner urges with any seriousness that this method of anticipating an issue involving the Fifth Amendment provides an adequate basis of federal jurisdiction. The fallacy of any such contention can hardly be debatable in the light of the *Mottley* case and others applying the same rule. In *Tennessee v. Union & Planters Bank*, 152 U. S. 454, this court said:

> "By the settled law of this Court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that or those laws."

A fortiori, a suit does not arise under the Constitution of the United States by including in the complaint an anticipated reply to an anticipated defense. That is what petitioner's reference to the Fifth Amendment in this case amounts to.

Moreover, the Fifth Amendment relates only to governmental action, federal in character, not to private persons, who, if they act on their own initiative and expressing their own will, do not offend the Constitutional guarantees, however else they may offend. *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 127 F. 2d 33; *Talton v. Mayes*, 163 U. S. 376, 382; *Corrigan v. Buckley*, 271 U. S. 323.

There have been several recent cases wherein employees of railroads complaining of a breach of contractual relationship, suing the carrier or bargaining agent, or both, have sought to litigate in the federal courts and to support jurisdiction there by oblique references to federal railway legislation and/or the Constitution of the United States. The Circuit Courts of Appeals for the Sixth, Fourth and Tenth Circuits have unanimously denied federal jurisdiction in these cases.

Teague v. Brotherhood of Locomotive Firemen and Enginemen, supra, is indistinguishable from the present case. The plaintiff there was a negro fireman. The complaint was practically identical with the complaint in this record, and the relief sought was the same. The Circuit Court of Appeals for the Sixth Circuit denied federal jurisdiction and used the following language:

> "* * * such rights as are here claimed arise from the individual contracts of the Negro firemen with the defendant Railroad. The appellant is unable to point to provision of the Railway Labor Act which protects such rights, or permits their invasion. The provisions of Sec. 2, subd. eighth, makes the terms of the collective bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

Barnhart v. Western Maryland R. R. Co., supra, was another case in which an employee sued a railroad on a claim involving a breach of contract with elaborate references to federal railroad legislation as the sole grounds for federal jurisdiction. That jurisdiction was denied by the Circuit Court of Appeals for the Fourth Circuit, which said:

> "The employment may have been inspired by the Act, but a right of action for the defendant's alleged breach of the contract does not arise from the Act; but only from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."

Burke v. Union Pacific R. R. Co., supra, is another case where a railroad employee claimed that his seniority rights had been violated and his contractual rights infringed. The Circuit Court of Appeals for the Tenth Circuit denied federal jurisdiction, saying:

"No federal statute other than the Railway Labor Act is here in the instant case alleged to be involved, and only to the extent that plaintiff in part followed certain of its provided procedure, and that he had exhausted his remedies thereunder. He claims under the terms of a collective agreement for simple breach of contract, with no diversity of citizenship nor any alleged violation of any right guaranteed under the federal constitution, for damages either expressly or inferentially arising, in excess of interest and costs, in sum of more than $3,000.00."

IV. Assuming, arguendo, that any federal question is presented by the complaint, such federal question is unsubstantial and insufficient as a basis of federal jurisdiction.

We have argued that petitioner's cause of action, as this is to be understood from a legal construction of the complaint, does not require any reference to the Railway Labor Act or the Constitution, and that the rule has been firmly established that federal jurisdiction can not be founded upon allegations in the complaint anticipating a probable defense that would create an issue involving the construction of a federal statute or the Constitution. It is our opinion that this case is controlled by the decision in the *Mottley* case. But, for the purposes of argument, and lest there be any aspect of the controversy overlooked, let us assume that to establish federal jurisdiction a probable defense involving a federal question may properly be anticipated in the complaint. Or, to serve the same argumentative ends, we may assume that the rights claimed by petitioner in the complaint, under the Railway Labor Act, are an integral part of, and essential to, the statement of petitioner's cause of action. The case would nevertheless be without federal jurisdiction, for the statutory rights asserted are so plainly non-existent that the federal question appearing on the face of the complaint must be held to be

unsubstantial. The controlling rule of law in this respect was lucidly expounded by this Court in the case of *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103 (1933), as follows:

> "Whether an objection that a bill of complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. (Citations) And the federal question averred may be plainly unsubstantial either because obviously without merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'."

Another statement of the same rule, in a somewhat different manner but to the same effect, by Mr. Justice Holmes, is to be found in the case of *The Fair v. Kohler Die Co.*, 228 U. S. 22 (1913).

We understand this rule to be that a suit, although it purports to arise under a federal law, does not meet the requirements for federal jurisdiction under either of the following circumstances: First, when the alleged federal question has been so definitely resolved and settled by previous decisions of the United States Supreme Court that there is no longer any room left for reasonable doubt or controversy on the point. Second, when the federal question is found upon examination to be so devoid of merit that it is said to be "unsubstantial." This is not to say that a case which ultimately fails on its merits is thereby proved to be without federal jurisdiction. That obviously could not be the rule, for, if it were, federal jurisdiction

would exist only in those cases that were well founded on their merits. In the language of Mr. Justice Holmes (*The Fair v. Kohler Die Co., supra*), "(Federal) Jurisdiction is authority to decide the case either way." But petitioner's claim that he is possessed of a federal statutory cause of action may be found, upon examination of the complaint and the statute or constitutional provision relied on, to be so wanting in merit that the result, in form at least, must be a denial by the court of jurisdiction of the case.

We believe that the claims made by petitioner in the complaint to rights bestowed upon him by the Railway Labor Act will be found, upon examination of the Act, to be so plainly without merit that petitioner's claim to a federal question in this action must be characterized as "unsubstantial."

We will first examine the complaint to learn what "rights" petitioner claims under the Railway Labor Act, or, in the alternative, to learn of the duties that the Act is said to impose upon a representative. The Act will then be considered to determine whether the claims are borne out.

The complaint asserts, as we understand it, that the Railway Labor Act imposes upon the Brotherhood the following duties when functioning as a representative:

1. The Brotherhood owes to each employee the statutory duty to represent him fairly, impartially and in good faith.
2. The Brotherhood owes to each employee the same duties, and must conform to the same standards of responsibility, that obtain between a common law agent and his principal.
3. The Brotherhood owes to each employee the right to be heard or consulted with respect to every contemplated move or action taken by it in its capacity as a representative; it owes to each employee the

opportunity of voting on every contemplated move or action, in order that the authority of the representative at any particular time may be established and known.

4. The Brotherhood is required to fully and promptly report the results of negotiations and dealings with the carrier to each employee whose interests are affected by its dealings with the carrier.

We gather from a study of Petitioner's contentions in the courts below that he finds, in three sentences in the Railway Labor Act, the source of the duties enumerated above. The first sentence is in Sec. 2, Fourth, and reads,—"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." The second is in Sec. 2, Ninth, and reads,—"Upon receipt of such certification the carrier shall treat with the representative of the craft or class for the purposes of this Act." The third sentence is the definition of a representative, contained in Sec. 1, Sixth,—"The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

From those three sentences petitioner has deductively fashioned a legislative mosaic of specifications defining the duties of a representative. He acknowledges that these representative's duties he professes to find in the Act are not set forth literally,—that they are revealed only through the process of implication.

Petitioner's contention is opposed by the significant fact that the Congress, had it desired so to do, could have incorporated in the Railway Labor Act specifications controlling the relationship of employees and their representatives,—could have defined their respective rights and duties. But Congress did not see fit to legislate upon the

subject, and it is not within the accepted province of the courts to arrogate to themselves the power to legislate, particularly when Congress has had an eminently favorable opportunity to legislate upon the subject-matter and declined to do so.

Petitioner contends that the Railway Labor Act must be "interpreted" by the courts, and by this process the respective rights and duties of employees and their representatives will be discovered. The suggestion is not appropriate to the case. The three sentences quoted above from the Railway Labor Act and relied on by petitioner as the source of his alleged rights are clear and unambiguous as far as they go. "Where the language of a statute is plain, there is no room for construction." *Eclipse Lumber Co. v. Iowa Loan & Trust Co.*, 38 F. 2d 608 (C. C. A. 8th, 1930). *Corona Coal Co. v. United States*, 263 U. S. 537. Interpretation and construction of a statute become necessary and proper only when the precise meaning of the legislative enactment is in doubt, or, one might say, is a matter of reasonable dispute. Here we have no such situation. There is no language to be found in the Railway Labor Act that is indicative of an intent on the part of Congress to define the respective rights and duties of employees and their representatives. The District Judge, in his opinion, found that the Act contained no provision defining the respective rights and duties of employees and their representatives (R. 36) his opinion reading in part:

> "The question presented is whether or not the Railway Labor Act, after providing as it does, procedure for selecting a bargaining agent as sole representative of a craft or class and making it the duty of the Railway to recognize and treat with such bargaining agent, stops short without imposing any duty or obligation upon such bargaining agent to represent fairly and impartially the minority as well as the majority members of the craft or class, and without affording any remedy to the minority, in this instance the Negro fire-

men, for alleged wrongful and fraudulent misrepresentation such as is specifically and directly charged in the complaint.

"To state the question another way, are the minority members of a craft or class given any remedy by the Railway Labor Act of 1934, for alleged wrongs committed by the bargaining agent, or is the minority relegated for relief to the law of the state or states in which the wrongs are alleged to have been perpetrated?

"As already noted, the Railway Labor Act of 1934 provides for the members of a craft or class of an interstate railway to select a bargaining agent to represent that craft or class for the purpose of collective bargaining; and requires the Railway to recognize and treat with the agent so selected, *Virginian Railway Co. v. System Federation No. 40, etc.*, 300 U. S. 515, affirming Fourth Cir., 84 Fed. 2d 641, and the Railway can treat only with the agent selected by the craft or class, *Atlantic Coast Line R. Co. v. Pope*, Fourth Cir. 119 Fed. 2d 39. However, we search the Railway Labor Act in vain for any provision affording protection to the minority against wrongful, arbitrary or oppressive action of the majority through the bargaining agent which the majority has selected. The Act is silent in that respect. It stops short after providing for the selection of the bargaining agent and imposing upon the Railway the duty to treat with that agent alone after he is selected * * *." Cf. *Teague v. Brotherhood of Locomotive Firemen and Enginemen* (C. C. A. 6th) 127 F. 2d 53, 56.

The petitioner, in reality, is not seeking *judicial construction* of a statute. He is, in effect, seeking to amend the Railway Labor Act by the process of *judicial legislation*. The reaction of the federal courts to such a proposal has been repeatedly recorded. This Court forthrightly stated its views on the subject in *Ebert v. Poston*, 266 U. S. 548 (1925) as follows:

"The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

Other cases illustrating the declinations of federal courts to go beyond the proper function of a court as an interpreter of the laws, and to legislate, are the following:

U. S. v. Mo. Pac. Rd. Co., 278 U. S. 269 (1929);
Wabash R. Co. v. U. S., 178 F. 5 (C. C. A. 8th 1910);
U. S. v. Mo. Pac. Rd. Co., 213 F. 169 (C. C. A. 8th 1914).

Numerous and cogent reasons could be advanced, if they were relevant to the ultimate question at issue, why Congress did not incorporate in the Railway Labor Act a specific declaration that the relationship between employees and a representative should be tantamount to that of principal and agent under the common law, and that an individual employee should have the other rights against a representative that petitioner urges in this case. Among them would be that the remedy of changing representatives, which is available at the hands of a mere majority and may be exercised as often as the majority wishes, is adequate as a means of eliminating an incompetent, officious or otherwise undesirable representative.

It is significant in this respect that the Railway Labor Act recognizes no relationship between membership in a labor organization and the attainment of the Act's objectives by the process of collective bargaining through representatives. There is the further reason that Congress recognized the inexpediency of attempting to police, through the agency of the courts, substantially all collective bargaining procedure throughout the length and breadth of the land. If this form of supervision is necessary under the Railway Labor Act, no reason can be suggested why it is not equally necessary to all of the collective bargaining sponsored by the National Labor Relations Act. A still further reason for not bestowing upon an individual employee or any minority group of employees the rights the petitioner is seeking to find in the Act, is the shock that it would be to

confident and dependable relations between the employer and the representative of the employees. The validity of collective bargaining agreements could be constantly called in question by disgruntled employees, on the basis of procedural derelictions of the representative or the unauthorized exercise of authority.

Of course, fraudulent action by a representative is not shielded by the Railway Labor Act, and authority for its gradication by the courts is inherent in any court of general jurisdiction, without regard for the terms of the Railway Labor Act.

V. The judicial relief demanded by the complaint is not relief as to which jurisdiction is vested by the Railway Labor Act in the federal courts. Therefore, there is no federal jurisdiction in this case.

Even if it be assumed that the complaint sets out a case which requires judicial construction of the Railway Labor Act, nevertheless the relief therein sought is not justiciable in the federal courts. A line of cases decided by the Court in 1943 seems conclusive on this point. *Brotherhood of Railway & Steamship Clerks, etc. v. United Transport Service Employees of America*, 320 U. S. 715; *Switchmen's Union of North America v. National Mediation Board, et al.*, 320 U. S. 297; *General Committee, etc. v. Southern Pacific Co.*, 320 U. S. 338; *General Committee v. Missouri-Kansas-Texas R. R. Co., et al.*, 320 U. S. 323.

These cases announced the principle that when relief is sought in the federal courts under the provisions of the Railway Labor Act the case is not justiciable unless resort to the courts is expressly provided in the Act. This decision was arrived at after a comprehensive and philosophical review of cognate legislation over a period of fifty years. The Court, reviewing this legislation, commented upon the manifest intention of Congress to provide, as far as might be done, machinery for conciliatory methods and its en-

couragement of mediation and arbitration on a voluntary basis. The opinions in the *Missouri-Kansas-Texas* case and in the *Switchmen's Union* case emphasized the hesitancy of Congress to invoke the compulsions of the law upon delicate, controversial and explosive problems.

As stated in the *Missouri-Kansas-Texas* case (320 U. S. 335):

> "Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from the overlapping of the interests of two or more crafts. It established the same general principles of collective bargaining and applied a command or prohibition enforcible by judicial decree to only some of its phases."

The conclusion of the Court is summarized in the same case (320 U. S. 337) as follows:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in the field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration."

And in the *Switchmen's* case the opinion epitomized the basic principle thus (320 U. S. 302):

> "On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the *Missouri-Kansas-Texas R. Co.* case beyond our conclusion that Congress

intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

There is, in our judgment, a close parallel between the issues decided in the *Switchmen's* case and those which the petitioner seeks to raise in this case. This parallel is so complete that it deserves to be emphasized.

The complaint in the *Switchmen's* case was a challenge to the legality of the action of the National Mediation Board when it ruled that the provisions of the Railway Labor Act required it to treat all of the employees of a single carrier engaged in the same type of work as constituting a single craft or class. Integral with this action the Board ordered that an election be held among all the switchmen employed by the New York Central System for the purpose of electing a representative of the entire craft. The election was held, and a rival union of the Switchmen's Union was certified by the Board as the representative of all t switchmen employed on the New York Central System.

As stated above, the Switchmen's Union complained that the National Mediation Board had acted in a manner inconsistent with the provisions of the Railway Labor Act. Specifically, the Switchmen's Union contended that the Railway Labor Act not only did not compel the National Mediation Board to group all of the employees of a railroad system engaged in one class of work into one craft or class and be represented for collective bargaining purposes by one representative, but that the Act actually forbids such action by the National Mediation Board.

In short, the issue was whether the National Mediation Board had acted in a manner consistent with its statutory duties or obligations toward the Switchmen's Union and those represented by the Union.

This is precisely the character of complaint which the petitioner seeks to develop in the instant action, with the

only difference being that the object of the complaint in the *Switchmen's* case was the National Mediation Board, while the object of the complaint here is a representative of a craft or class whose appointment, and recognition by the carrier, is required, or at least authorized, by the Railway Labor Act.

Here the petitioner complains that the statutory representative has acted in a manner inconsistent with those provisions of the Railway Labor Act which allegedly define the duties and obligations of the representative. The petitioner seeks to have the federal courts review the action of the representative, interpret the pertinent provisions of the Railway Labor Act, and spell out the statutory duties and obligations of the representative under the facts alleged to obtain.

This Court held in the *Switchmen's* case that it had not been authorized by the terms of the Railway Labor Act to review the decisions of the National Mediation Board. That, in fact, the terms of the Act and the history of railway labor legislation manifested a congressional intention that labor issues of this character were not to be submitted to the courts for decision. The empirical approach of the Congress to the solution of railway labor problems by the process of trial and error should not be disregarded by the courts. They are to take jurisdiction only when specifically authorized by the Act to do so. The machinery of conciliation, mediation and arbitration should remain the primary means of effecting industrial peace on the railroad systems of the country unless, and until, Congress specially directs otherwise.

This is the substance of the Court's holding in the *Switchmen's* case, as we understand it. The considerations that brought the Court to the conclusion it arrived at did not stem from the fact that an administrative agency was the subject of the attack. They were derived from an appreciation of the intricate and technical character of

carrier and employee relations, and a recognition of the fact that the field is appropriate for regulation by the Congress, not the courts.

These considerations apply with equal vigor in refutation of petitioner's contentions in the instant case. The fact that the agency whose action is assailed here is a statutory representative instead of an administrative board, as in the *Switchmen's* case, does not alter the underlying considerations that led the Court to the decision it arrived at.

This Court is being asked to review the Brotherhood's action, undertaken in its capacity as a statutory representative, of negotiating a contract with the defendant carrier for the purpose of determining whether such action was consistent with its statutory duties. But the Congress has not authorized the federal courts to review the procedure or means by which a representative performs its statutory duty of bargaining on behalf of a class or craft of employees. Neither has the Congress authorized the federal courts to examine into the validity of the agreements negotiated by the representative. The Railway Labor Act is silent on these matters.

We believe, therefore, that the absence of such grant of jurisdiction to the federal courts necessitates the same conclusion here as was arrived at in the *Switchmen's* case, to-wit, that the Congress intended controversial issues of this character to be settled by administrative action, or by the process of negotiation.

If individual employees are or become dissatisfied with the terms of agreements made between a collective bargaining agent and a carrier because they alter or modify privileges enjoyed under earlier agreements, it would seem that such would be a condition or circumstance incidental to the process of collective bargaining. No doubt examples are plentiful of instances of dissatisfaction by employees or minority groups within a craft in respect of the terms of

the collective bargaining agreement affecting them. It should be clear that Congress has not as yet seen fit to authorize the submission of that type of dispute to the federal courts which would have as its obvious objective the elimination or adjustment of the alleged sources of dissatisfaction.

Petitioner, aggrieved by the provisions in the agreement of February 18, 1941, is either afforded an administrative remedy by the Railway Labor Act (as we think he is) or he finds himself in an "area" where neither the administrative nor the judicial function can be utilized." In either case, resort to the courts is denied him.

The Railway Labor Act, § 3, First (i) provides that an individual employee or group of employees may be heard before the Adjustment Board for the adjudication of disputes with a carrier "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." And § 3, First (j) provides that such an employee or group "may be heard either in person, by counsel, or by other representatives, as they may respectively elect." This petitioner did not see fit to avail himself of the administrative relief thus proffered him. If he had done so, the award of the Adjustment Board would have been final and binding upon him § 3, First (m).

Pared down to its essentials, the complaint here is that petitioner and others for whom he professes to speak are minority members of a craft which has chosen a bargaining agent, which agent has made on behalf of the entire craft an agreement with the carrier unsatisfactory to the petitioner, because, as he alleges, it is discriminatory against him and the minority group of the craft for which he undertakes to speak. He asks the courts to declare the objectionable provisions of the contract unenforcible.

We may pass for the moment the difficulty of making any agreement on behalf of a craft satisfactory to all the

component members thereof. Petitioner claims that the bargaining agent selected by the majority of the craft is a union which denies him and all other negroes in the craft the privilege of membership therein, and—by inference and innuendo—therefore discriminated against the negro members of the craft.

A cognate state of facts was presented to this Court in *Brotherhood of R. S. Clerks v. United Transport Service Employees*, 320 U. S. 715. In that case some 45 negro red caps organized as a local chapter of United Transport Service Employees, a union which admitted negroes to membership, and with said union applied to the employer to recognize that union as their bargaining agent and to execute with the union, as such, a working and wage agreement. Upon refusal of the employer to recognize the United as bargaining agent for the red caps, the services of the National Mediation Board were invoked, and that tribunal held that the red caps were represented by the Brotherhood of Railway and Steamship Clerks as bargaining agent and that the Brotherhood, as such agent, had already executed with the employer a working agreement by the terms of which the red caps were bound. The Brotherhood denied to negroes the privilege of membership.

Five of the red caps, suing for themselves and the others of the group, appealed to the federal courts to review the order of the Mediation Board. The situation of the minority group of negro red caps as a component part of the craft represented by the Brotherhood of Railway and Steamship Clerks was essentially identical with the situation of petitioner, and other negro firemen as a minority group in the craft represented in the present case by the Brotherhood of Locomotive Firemen and Enginemen. In each case the bargaining agent was a union which refused to admit them to membership, but nevertheless was authorized to make on their behalf contracts with the employer by which these groups were bound.

The District Court for the District of Columbia took jurisdiction of the case and reversed the order of the Mediation Board, holding that United must be certified by the Board to the employer as bargaining agent for the red caps. The Court of Appeals for the District of Columbia affirmed the District Court. In the opinion of Chief Justice Groner the situation of the negro group is thus graphically portrayed—137 F. 2d 821:

> "The Brotherhood, designated by the Board as the bargaining agent of the porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary."

Nevertheless, this Court held that the case was governed by the principles it had announced in the *Missouri-Kansas-Texas* case and the other cases decided at the same time and cited above, and that the case was not justiciable.

These cases are controlling authority here. However any individual or group may be affected by action taken pursuant to the Railway Labor Act, litigation may not be resorted to unless expressly permitted by the Act. This Court has held that the courts may not decide the conflicting claims of organized groups to represent a craft, and

a fortiori they may not decide a dispute between an organized group, duly accredited as a bargaining agent for a craft, and an unorganized group within that craft.

It would seem manifest that the vesting of jurisdiction in the federal courts to decide such a case as is here presented would nullify the whole rationale of the opinion in the *Missouri-Kansas-Texas* case. Every agreement made by a bargaining agent with a railroad would be the subject of judicial scrutiny at the behest of any disgruntled member of the craft who might allege that the contract made by that bargaining agent on behalf of the craft with the railroad operated to his disadvantage. All stability of status between the railroad and its employees would be lost. The very purpose of the Act, peaceable settlement of labor controversies and the avoidance of interference by the courts, would be set at naught.

Every railroad must treat with the bargaining agent selected and with no other. *Virginian R. Co. v. System Federation*, 300 U. S. 515. In that case this Court said:

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern."

Contracts so made, pursuant to the Railway Labor Act and in obedience to the mandate of this Court, ought not to be subject to revision by the courts upon the demand of a member of the craft who considers himself aggrieved by the terms thereof. It clearly was not the intention of the Congress to provide that contracts should be made by railroads with a designated agency selected by the employees, and then permit such contracts to be abrogated, amended, or enlarged by the courts. That way chaos lies. Were such demands to be judicially entertained and decided, other individuals or groups within the craft might well claim

that the decision adversely affected them and ask for further modification of the contract collectively made by the bargaining agent with the railroad. Stable contractual status would be non-existent; far from being promoted, industrial peace would be rendered well nigh impossible.

It seems evident that this Court had cognate considerations in mind when it rendered the recent decisions exemplified by the *Missouri-Kansas-Texas* case.

CONCLUSION.

In recapitulation of the arguments developed in the several preceding sections of this brief, we reiterate that the record reveals beyond question the fact that there was not even an attempted service of process on the Brotherhood of Locomotive Firemen and Enginemen, and that the purported service on Ocean Lodge No. 76 is manifestly contrary to statute and decision, with the consequence that neither the Brotherhood nor said lodge are before the Court or under its jurisdiction in this proceeding. Petitioner by his complaint seeks a declaratory judgment involving, and an injunction against enforcement of, a contract only one party to which is before the Court, to-wit, Norfolk Southern Railway Company.

Without waiving this contention we submit that any fair analysis of the complaint leads to the conclusion that the purpose of this action is to protect petitioner's alleged seniority rights. The source of these rights is a contract,—not the Railway Labor Act or other federal law. Petitioner alleges that the defendant railroad has refused to respect petitioner's alleged seniority rights and to accord him the runs to which they entitle him. The cause of action as thus stated and supplemented by allegations as to damages is complete, and it is not a cause of action arising under the Railway Labor Act.

The references in the complaint to the Railway Labor Act are wholly unnecessary and irrelevant to the statement

of the cause of action and serve only to anticipate a possible defense. We have shown that the injection of a federal question into the complaint by this means cannot be the basis for establishing federal jurisdiction. Many federal decisions have dealt previously with similar attempts to present a case commanding federal jurisdiction and uniformly jurisdiction has been denied. We believe that the rules thus announced are conclusive of the claim to federal jurisdiction in this case.

We have also analyzed the many references to the Railway Labor Act in the complaint on the assumption that they are vital to the statement of petitioner's cause of action. The Railway Labor Act has been examined in an effort to discover therein the rights claimed by petitioner. It has been revealed there is no language in the Act bestowing upon petitioner the rights claimed, and we have furthermore demonstrated that it is a rule of the federal courts to decline to legislate to the extent that would be necessary to sustain petitioner's claim under the Act. The purported federal question is hence unsubstantial, and federal jurisdiction cannot be predicated upon it.

We have shown that the relief demanded by the complaint is not such relief as federal courts may grant under the Railway Labor Act. In this relation we have reviewed the recent decisions of this Court in the *United Transport Service Employees, Switchmen's Union, Southern Pacific* and *Missouri-Kansas-Texas* cases which establish the principle that when relief is sought in the federal courts under the provisions of the Railway Labor Act the case is not justiciable unless resort to the courts is expressly provided for in the particular type of case. The anomaly which would be involved in the taking of jurisdiction of this action, while jurisdiction was declined in the four cases just alluded to, is difficult to state more clearly than in the language of the Circuit Court of Appeals:

"Closely analogous to the case at bar is the case of *General Committee, etc. v. Southern Pac. Co., supra.* That was a suit for declaratory judgment that provisions of an agreement between a carrier and a committee representing firemen concerning the demotion of engineers to firemen and the calling of firemen for service as emergency engineers were invalid under the Railway Labor Act. Complainants there based their right to relief upon the same provisions of the act guaranteeing employees the right to bargain collectively through representatives of their own choosing as are relied on here; but the court held that the questions presented were not justiciable issues under the Act. The court said (64 S. Ct. 145): 'We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the *Missouri-Kansas-Texas R. Co.* case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in the *Switchmen's* case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others.'

"If the courts are without power under the provisions of the act relied on to declare a contract void because the association which negotiated it was not authorized to represent complainants, they are equally without power to make such declaration where the complaint is that it has not represented them fairly. If the courts may not under the act declare where the exclusive jurisdiction of one craft ends and the authority of another begins with respect to the right of collective bargaining, *a fortiori* they are without

power to declare the duties of a bargaining agent within the limits of his undoubted jurisdiction. It would be absurd to hold that the courts have power to declare a contract void because the bargaining agent has not properly and impartially represented different groups of employees, but are without power where he is not authorized to represent them at all. If the courts may not make a determination between conflicting rights of organized groups, it is difficult to see how their power should be extended by the mere fact that one of the groups is unorganized." (130 F. 2d 37.)

We have made the point that a decision investing federal courts with power to adjudicate such a case as herein presented would be an invitation to countless suits by disgruntled members of any craft of workers who might allege that the collective agreement made by their bargaining agent operated to their particular disadvantage. Judicial approval of this type of litigation would destroy the stability of relations between railroads and their employees, and the purposes of the Act to settle controversies by its conciliatory processes, without interference by the courts, would be nullified.

For the reasons discussed in this brief we submit that the complaint was properly dismissed.

Respectfully submitted,

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